

1 PAUL B. SNYDER  
2 United States Bankruptcy Judge  
3 1717 Pacific Ave, Suite 2209  
4 Tacoma, WA 98402

✓ FILED  
— LODGED  
— RECEIVED

5 **September 25, 2007**

6 MARK L. HATCHER  
7 CLERK U.S. BANKRUPTCY COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA  
10 \_\_\_\_\_DEPUTY

11 **UNITED STATES BANKRUPTCY COURT**  
12 **WESTERN DISTRICT OF WASHINGTON AT TACOMA**

13 In re:

14 ERIK MICHAEL CLARKSON  
15 DAPHNE VICTORIA CLARKSON,

16 Debtors.

Case No. 05-40062

17 **MEMORANDUM DECISION**

18 This matter came on for hearing on September 6, 2007, on the Motion for Declaratory  
19 Judgment Re Enforceability of Judgment (Motion) filed by the Chapter 7 Trustee (Trustee)  
20 and Erik and Daphne Clarkson (Debtors). Based on the pleadings and arguments presented,  
21 the Court's findings of fact and conclusions of law are as follows:

22 **FINDINGS OF FACT**

23 In November, 2000, the Debtors filed a lawsuit (State Court Lawsuit) in Pierce County  
24 Superior Court (State Court) against Unique Construction, Inc. (Unique), seeking specific  
25 performance of a 1999 Residential Real Estate Purchase and Sale Agreement. After several  
delays, the State Court set a trial date in May, 2005. Subsequently, on January 5, 2005, the  
Debtors filed a voluntary Chapter 7 petition for relief. The trial date was stricken after the  
Debtors filed a Notice of Bankruptcy Filing on April 12, 2005.

MEMORANDUM DECISION - 1

1 The Debtors' original bankruptcy schedules did not list the State Court Lawsuit as an  
2 asset of the bankruptcy estate, nor was Unique listed as a creditor. On March 11, 2005, the  
3 Debtors filed amended Schedules B and C, listing the State Court Lawsuit as an asset with a  
4 value of \$14,500, and claiming the entire amount exempt. An amended Schedule F was also  
5 filed including Unique as a possible creditor. The claim was described on Schedule F as  
6 "2000 Professional Services Possible counter-claims in specific performance lawsuit, Pierce  
7 County." Unique did not file a proof of claim and the Debtors were granted a discharge on  
8 April 5, 2005.  
9

10 On February 28, 2006, Unique filed a Motion to Abandon Cause of Action as Asset of  
11 Estate or, Alternatively, to Set Deadline For Debtor to Pay Requisite Retainer to Retain  
12 Special Trial Counsel. The Trustee objected on the grounds that the Debtors' attorney in the  
13 State Court Lawsuit (Attorney), had agreed to accept the case on behalf of the estate.  
14 Daphne Clarkson (Debtor) submitted a declaration objecting to abandonment and stating that  
15 she wanted to proceed with the State Court Lawsuit, as she had reached an agreement with  
16 Attorney for the payment of the retainer fee required to pursue her claim. The Debtor  
17 indicated that she had previously been unable to finance the lawsuit due to her financial  
18 problems. The Debtor further requested that she be given no less than 120 days from the  
19 date of the Court hearing on this motion to allow the home to be listed, sold, and for funds to  
20 be deposited in Attorney's trust account.  
21

22 Attorney filed a declaration on March 15, 2006 stating:

23 2. I have reached an agreement with the Debtors for the payment of the  
24 retainer necessary to pursue the claim. I have also consulted with Mark Waldron,  
the Bankruptcy Trustee, concerning this arrangement.

25 3. Daphne Clarkson is currently listing her home for sale. She has agreed to  
pay \$15,000 from the proceeds of the sale to our attorney trust account as a

1 deposit against attorneys' fees. She will be individually liable for attorneys' fees  
2 billed on an hourly basis at \$250.00 per hour and for costs and expenses incurred  
in the litigation.

3 4. Costs incurred will be considered an administrative cost of the bankruptcy.  
4 In exchange for financing the litigation from exempt property and post-petition  
5 income, the Trustee will agree to payment/reimbursement of all of Daphne  
Clarkson's post-petition attorneys' fees and costs in the litigation from the first  
6 dollars recovered by the Plaintiffs.

7 5. If the retainer is not paid within 120 days of approval of the fee  
8 arrangement by the Bankruptcy Court, we will not pursue the claim as Plaintiffs'  
attorneys and it is my understanding that they will consent to its abandonment as  
an asset of the bankruptcy estate.

9 Decl. of Attorney (Docket No. 29).

10 On May 9, 2006, Unique, the Debtors and the Trustee filed a stipulation stating that the  
11 Debtors would have until May 22, 2006, to pay a retainer to Attorney, such that he would  
12 accept employment as special counsel for the Trustee in the State Court Lawsuit, or the  
13 lawsuit would be deemed abandoned as an asset of the estate. A Stipulated Order Setting  
14 Deadline to Pay Retainer or Abandon Lawsuit as Asset of Estate (Stipulated Order) was  
15 approved by the Court on May 10, 2006. On that same date, the Debtor filed a motion  
16 requiring the Trustee to abandon her personal residence so that she could obtain financing  
17 secured by her residence to fund the State Court Lawsuit. She indicated in this motion that  
18 value may be conferred on the Debtors' estate if successful. An Order Approving  
19 Abandonment of Property was entered on June 1, 2006.

20  
21 On May 18, 2007, the Trustee filed an application to employ Attorney and his law firm  
22 as attorneys for the estate. An order authorizing employment as special counsel was entered  
23 on May 18, 2007.

24 The State Court Lawsuit went to trial on May 31, 2007, and June 4-6, 2007. The  
25 Trustee was never substituted as a party to the State Court Lawsuit. Following the trial, the

MEMORANDUM DECISION - 3

1 State Court dismissed the Debtors' claims against Unique and entered a judgment on July 27,  
2 2007, against the Debtors, personally, in the amount of \$44,136.27 for attorney's fees and  
3 costs incurred by Unique as the substantially prevailing party (Judgment). The State Court  
4 found that Unique incurred prepetition attorney's fees of \$22,396.34 and prepetition costs of  
5 \$871.43. The State Court found that Unique incurred postpetition fees of \$26,415 and  
6 postpetition costs of \$4,452.50. The State Court expressly declined to rule on the  
7 enforceability of the Judgment in light of the pending bankruptcy case.  
8

9 On August 16, 2007, the Debtors and the Trustee filed a Motion for Declaratory  
10 Judgment Re Enforceability of Judgment, asking this Court to determine that the Debtors are  
11 not personally liable for the Judgment awarded to Unique. Unique has objected.

## 12 ISSUES

13 The issues in this case are as follows: (1) whether the Debtors are personally liable for  
14 that portion of the Judgment consisting of attorney's fees and costs incurred by Unique  
15 prepetition, and (2) whether the Debtors are personally liable for that portion of the Judgment  
16 consisting of attorney's fees and costs incurred by Unique postpetition.

## 17 CONCLUSIONS OF LAW

### 18 1. Prepetition Attorney's Fees and Costs

19 It is undisputed that prepetition claims are generally discharged in bankruptcy. Unique,  
20 however, argues that the contractual obligation to pay attorney's fees to Unique as the  
21 prevailing party was not discharged in this case because the Debtors revived this obligation  
22 by electing to voluntarily pursue the State Court Lawsuit postpetition.  
23

24 A Chapter 7 discharge "releases the debtor from personal liability for her pre-  
25 bankruptcy debts." In re Ybarra, 424 F.3d 1018, 1022 (9th Cir. 2005), cert. denied., 126 S. Ct.

1 2328 (2006) (citing Hatton v. United States (In re Hatton), 220 F.3d 1057, 1059-60 (9th Cir.  
2 2000)) (additional citations omitted). Pursuant to 11 U.S.C. § 727(b), a discharge granted  
3 under 727(a), “discharges the debtor from all debts that arose before the date of the order for  
4 relief under this chapter.” “Debt” is defined in the Bankruptcy Code as “liability on a claim.”  
5 11 U.S.C. § 101(12). “Claim” is defined as a “right to payment, whether or not such right is  
6 reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured,  
7 disputed, undisputed, legal, equitable, secured, or unsecured.” 11 U.S.C. § 101(5)(A). The  
8 definition of a claim in bankruptcy is broad and “designed to ensure that ‘all legal obligations  
9 of the debtor, *no matter how remote or contingent*, will be able to be dealt with in the  
10 bankruptcy case.” Jensen v. Cal. Dep’t of Health Servs. (In re Jensen), 995 F.2d 925, 929-30  
11 (9th Cir. 1993) (citations and quotations omitted) (emphasis in the original).

12  
13 Debts for attorney’s fees incurred prepetition in the Ninth Circuit are normally  
14 discharged in a Chapter 7 proceeding. “The plain language of the discharge provisions thus  
15 is clear. All of the debtor’s pre-petition debts, save those listed in § 523, are discharged in a  
16 Chapter 7 proceeding. Section 523 does not except pre-petition attorneys’ fees from  
17 discharge.” In re Biggar, 110 F.3d 685, 687 (9th Cir. 1997). Although cases admittedly exist  
18 in which courts have held that postpetition attorney fees survived discharge, this Court is not  
19 aware of a decision holding that discharged prepetition attorney fees could be revived by a  
20 debtor’s postpetition actions.

21  
22 It is undisputed that the underlying contract between the Debtors and Unique was  
23 entered into prepetition, the State Court Lawsuit was filed by the Debtors prepetition and the  
24 acts that gave rise to this portion of the award occurred prepetition. The Debtors were  
25 granted a Chapter 7 discharge on April 5, 2005. An exception to discharge under 11 U.S.C.

1 § 523 has not been alleged. This claim for attorney's fees, although not reduced to judgment  
2 until postpetition, arose prepetition and is concluded by the Court to be prepetition debt  
3 discharged in the Debtors' Chapter 7 bankruptcy case.

4 **2. Postpetition Attorney's Fees and Costs**

5 Unique also argues that the judgment imposing personal liability on the Debtors for  
6 postpetition fees of \$26,415 and costs of \$4,452.50 was not discharged.

7  
8 The Ninth Circuit Court of Appeals (Ninth Circuit) has concluded that a debtor can be  
9 personally liable for attorney fees incurred postpetition. In In re Siegel, 143 F.3d 525 (9th Cir.  
10 1998), the Ninth Circuit held that attorney fees arising from litigation commenced by the  
11 debtor postpetition on a prepetition matter were not discharged as a prepetition debt. In  
12 Siegel, the debtor (also the mortgagee) sued the mortgagor postpetition in state court on a  
13 lender's liability claim. The mortgagor removed the state court action to U.S. District Court,  
14 which entered summary judgment in its favor and awarded attorney's fees under the terms of  
15 the note and deed of trust. The debtor argued that the claim for attorney's fees was  
16 discharged in his bankruptcy. The Ninth Circuit disagreed, reasoning that after being "freed  
17 from the untoward effects of contracts he had entered into," through his discharge, the debtor  
18 "chose to return to the fray and to use the contract as a weapon." Due to the debtor's actions,  
19 it was "perfectly just, and within the purposes of bankruptcy, to allow the same weapon to be  
20 used against him." Siegel, 143 F.3d at 533. The Ninth Circuit concluded, "while his  
21 bankruptcy did protect him from the results of his past acts, including attorney's fees  
22 associated with those acts, it did not give him carte blanche to go out and commence new  
23 litigation about the contract without consequences." Siegel, 143 F.3d at 534.  
24  
25

1 In Ybarra, the Ninth Circuit reaffirmed the ruling of Siegel that “claims for attorney fees  
2 and costs incurred post-petition are not discharged where post-petition, the debtor voluntarily  
3 commences litigation or otherwise voluntarily ‘return[s] to the fray.’” Ybarra, 424 F.3d at 1026  
4 (quoting Siegel, 143 F.3d at 533-34). In Ybarra, a Chapter 7 debtor revived a dismissed,  
5 prepetition state court lawsuit against her former employer postpetition. The state court  
6 entered a judgment in favor of the employer and awarded it \$456,884.03 in statutorily  
7 authorized attorney’s fees and costs. The employer then moved for leave to enforce its  
8 judgment for fees and costs in bankruptcy court. The bankruptcy court ruled that the portion  
9 of the fee award incurred prepetition was discharged, but that the employer was free to collect  
10 that portion incurred postpetition (\$159,030.78). The Ninth Circuit Bankruptcy Appellate Panel  
11 (BAP), in a divided decision, reversed and held that the entire fee award was discharged. In  
12 re Ybarra, 295 B.R. 609, 617 (9th Cir. BAP 2003). The Ninth Circuit reversed the BAP, and  
13 relying primarily on Siegel, held that the fees and costs incurred postpetition were not  
14 discharged on the grounds that the debtor’s actions “to revive the state suit were sufficiently  
15 voluntary and affirmative to be considered ‘returning to the fray.’” Ybarra, 424 F.3d at 1027.  
16

17 The Trustee and the Debtors argue that this case is distinguishable from Siegel and  
18 Ybarra in that the State Court Lawsuit was pursued postpetition by the Trustee on behalf of  
19 the bankruptcy estate rather than by the Debtors personally. Thus, there is no basis for  
20 finding personal liability by the Debtors for the judgment awarded. According to the Debtors,  
21 Unique is therefore limited to a claim against the estate for the postpetition fees and costs. As  
22 the estate is not solvent, Unique would not receive a distribution on this claim.<sup>1</sup>  
23

---

24 <sup>1</sup> The Trustee filed a Report of No Distribution on September 6, 2007.  
25

1 In Siegel, the debtor independently filed a lawsuit against the judgment creditor  
2 postpetition. In Ybarra, the lawsuit from which the judgment arose was filed prepetition, but  
3 was pursued by the debtor postpetition after electing to take ownership of the action. Ybarra,  
4 424 F.3d at 1020. In neither case, did the Chapter 7 trustee pursue the action from which the  
5 judgment for fees stemmed on behalf of the bankruptcy estate.

6 The facts of this case are unique. This is not a case where the Trustee substituted in  
7 as the real party in interest, hired an attorney on a contingency basis, and pursued the  
8 litigation on behalf of the estate with no involvement of the Debtors. In such an instance,  
9 there can be no doubt that the State Court judge could not have imposed personal liability on  
10 the Debtors, as they would no longer have been named parties, and the litigation would have  
11 been continued by the Trustee on behalf of the bankruptcy estate. Unique would then have  
12 been limited to a claim against the estate. If the facts were instead that the Debtors  
13 commenced the lawsuit postpetition, as in Siegel, or proceeded with the lawsuit postpetition  
14 entirely independent of the Trustee, as in Ybarra, the result would also be clearer. The law of  
15 the Ninth Circuit is that these postpetition fees would not be subject to discharge.

16 This case presents a more difficult fact pattern in that the Debtors' pursuit of the State  
17 Court Lawsuit was not entirely independent of the Trustee. The Stipulated Order entered on  
18 May 10, 2006, between Unique, the Debtors and the Trustee, required the Debtors to pay a  
19 retainer to Attorney that was acceptable, such that he would "accept employment as special  
20 counsel for the Trustee in the State court action." Stipulated Order at 2 (Docket No. 34). An  
21 order of employment was subsequently entered on May 18, 2007.

22 Despite the above, it is clear from the record before the Court that the Debtors were the  
23 driving force behind the continuance of this litigation. Attorney was apparently unwilling to  
24  
25



1 pursue the State Court Lawsuit on a contingency basis on behalf of the estate or the Debtors.  
2 The estate was insolvent so the Trustee was unwilling to pursue this litigation unless the  
3 Debtors were willing to assume liability for Attorney's fees. The Debtors therefore agreed to  
4 be personally liable for Attorney's fees and costs. Even though the Debtors would be  
5 reimbursed from the first dollars recovered, the Debtors accepted personal liability for  
6 Attorney's fees in the event they were unsuccessful. The Debtors secured sufficient funds to  
7 pay Attorney's retainer so that the State Court Lawsuit could proceed. The Trustee was never  
8 substituted as the real party in interest.  
9

10 As stated in Siegel and Ybarra, the issue in this case is whether the Debtors took  
11 sufficient affirmative action postpetition, or otherwise "returned to the fray," that warrants  
12 imposing personal liability for the postpetition fees and costs awarded. Ybarra, 424 F.3d at  
13 1026-27. In this case, the Debtors could have elected not to fund the litigation postpetition  
14 and be free of any liability stemming from it. If the Debtors had elected not to pursue it, the  
15 Trustee made clear that he was not going to pursue the litigation on the estate's behalf. This  
16 lawsuit only proceeded because the Debtors chose to pursue it and agreed to finance it. The  
17 potential benefit to the Debtors, if successful, was reimbursement of their Attorney's fees and  
18 costs from the first dollars recovered and payment of the \$14,500 claimed as exempt. In  
19 taking that action, Unique was forced to defend the lawsuit and incur significant additional  
20 postpetition fees and costs in the process. Based on these facts, the Court concludes that the  
21 Debtors' postpetition actions in pressing the State Court Lawsuit are sufficient to find that the  
22 postpetition fees and costs at issue were not discharged in their bankruptcy.  
23

24 Although not from this circuit, the bankruptcy court in In re Hadden, 57 B.R. 187  
25 (Bankr. W.D. Wis. 1986), reached the same conclusion on similar facts. In Hadden, the

1 debtor voluntarily continued litigation postpetition that was initiated prepetition. The  
2 bankruptcy court refused to discharge a judgment for attorney fees incurred postpetition. The  
3 court concluded that the debtor's actions were sufficient to hold that the attorney's fees  
4 incurred postpetition were not discharged. Balancing the goal of bankruptcy to provide the  
5 debtor with a fresh start and preventing post-bankruptcy acts "undertaken with impunity," the  
6 court concluded: "If the debtor chooses to enjoy his fresh start by pursuing pre-petition claims  
7 which have been exempted, he must do so at the risk of incurring the post-petition costs  
8 involved in his acts." Hadden, 57 B.R. at 190. Similar to this case, the Chapter 7 trustee's  
9 involvement in Hadden was minimal, although he was ordered by the state court to be made a  
10 party to the state court action. Hadden was cited in support of the Ninth Circuit's holdings in  
11 both Siegel, 143 F.3d at 533, and Ybarra, 424 F.3d at 1024.  
12

13 Based on the above, the Court concludes that the Debtors' liability for fees and costs  
14 awarded to Unique for prepetition services was discharged. The Debtors, however, are  
15 personally liable for that portion of the Judgment consisting of postpetition attorney's fees of  
16 \$26,415 and costs of \$4,452.50. The Court reserves ruling on Unique's request for an  
17 additional \$3,750 in attorney's fees incurred in defending this Motion. If, based on this ruling,  
18 Unique determines it still has a basis for requesting such fees, they must be sought by  
19 separate motion.  
20

21 DATED: September 25, 2007

22 

23 Paul B. Snyder  
24 U.S. Bankruptcy Judge  
25